85-677

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEGRITO COMERCIAL, S.A.,
Petitioner

v.

SEA-LAND SERVICE, INC., and VICTORY TRANSFER CO.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Texas law governs the dishonoring of a short form bill of lading in Laredo, Texas, when the case is submitted as a diversity case and not as a federal case under the Harter Act 46 USCA § 190-196 or Carriage of Goods by Sea Act 46 USCA § 1300 et seq. and where the joint pre trial order states that it is a diversity case.

2. Whether the Trial Court's conclusion that the term "house to house" typewritten on the face of the eight short-form bills of lading is subject to printed provisions in a tariff incorporated by reference in the long form bill of lading which is in turn incorporated by reference in the short form bill of lading is erroneous.

3. Whether the Carriage of Goods by Sea Act can be made applicable beyond its own terms (after goods are discharged) by incorporating it by reference, in the short form bill of lading.

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v.

SEA-LAND SERVICE, INC., and VICTORY TRANSFER CO.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Negrito Comercial, S.A., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit of June 10, 1985 and the Order of July 29, 1985 denying the Petitioner's Petition for Rehearing.

OPINION BELOW

The Order of the Court of Appeals (App. A, infra 1a) denying Petitioner's Petition for Rehearing is unreported. The Judgment and Opinion of the court of appeals (App. B, infra 3a, 5a) are unreported. The only opinion of the district court was Findings of Fact and Conclusions of Law, set forth in App. C, infra 6a-17a. The judgment of the district court is set forth in App. D, infra 18a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 10, 1985 (App. B, infra 3a, 5a). A timely petition for rehearing was denied on July 29, 1985. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

46 USCA § 1301(e) Definitions

> (e) The term "carriage of goods" covers the time when the goods are loaded on to the time when they are discharged from the ship.

46 USCA § 1311 Liabilities before loading and after discharge; effect on other laws.

> Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

STATEMENT OF THE CASE

Petitioner's claim, aside from interests, costs, and attorney's fees, is essentially two-fold: (1) monetary damage for seven-hundred forty (740) cases of brandy that were damaged or destroyed while in transit from Spain to Mexico City; and (2) monetary damages for losses incurred by Petitioner as a consequence of Respondents' dishonoring its short form bill of lading and refusing to deliver the brandy to Petitioner. Basis for federal jurisdiction was under 28 USCA § 1332.

Petitioner, Negrito Comercial, S.A. ("Negrito"), a Mexican corporation with its principal place of business in Mexico City, purchased approximately 11,000 cases of

brandy on December 16, 1980 from the Fernando A. De Terry Company of Spain. The brandy was loaded into eight sealed containers of 1,379 cases. On December 16, 1980, these containers were delivered to Respondent, Sea-Land Service, Inc. ("Sea Land") at Algeciras, Spain. They were loaded aboard the vessel Independence for carriage to the port of Houston, Texas.

Eight short-form bills of lading were issued by Sea-Land covering the merchandise. The merchandise was received by Sea-Land in good condition and no exceptions were noted on any of the bills of lading as to either damaged goods or shortages.

The merchandise arrived in Laredo, Texas in different deliveries occurring between January 8 and 14, 1981. On each bill of lading, in the space labeled "Notify Party", was inserted Negrito's name and its Mexico City address. No customs broker at the Laredo Port was designated on the bills.

Respondent, Victory Transfer, Inc. ("Victory"), a Texas corporation, is the duly authorized agent for Sea-Land. Maria del Carmen Aquino was a Victory employee whose primary duty was to handle Sea-Land matters. Vicente Munoz was the operations coordinator for Sea-Land business in Laredo, Texas. The relationship between the two companies was that Victory would pick up containers off-loaded at the water port in Houston, bring them overland to Laredo, Texas and make them available to consignees and customs brokers for crossing into Nuevo Laredo, Mexico. In that capacity, Victory would receive and deliver merchandise as Sea-Land's agent.

Sometime in December 1980, Sergio Rivas, a Mexican customs broker representing Negrito, conversed with Aquino and advised that he was expecting the shipment of brandy from Spain. Aquino promised to call him when the shipment arrived, but got busy and forgot.

The primary controversy in this lawsuit, aside from the question of damage to some of the merchandise, results from a dispute that occurred when Mr. Contro and his brother appeared at the Victory office in Laredo to claim the merchandise for Negrito. It is undisputed that this controversy occurred on Friday, February 27, 1981. The parties, however, dispute whether or not this was the first time that there was any manifestation of a controversy over delivery of the shipment in question.

Rivas testified that he went to the Victory office in Laredo as early as February 15, 1981, attempting to have some or all of the merchandise crossed into Mexico, but that he was rebuffed. Hector Contro, a co-owner of Negrito, testified that Rivas reported this incident to him on February 24, 1981 which prompted the trip of February 27, 1981 to Laredo by the Contro brothers. Aquino testified that the confrontation of February 27 was the first discussion of the matter and Munoz, by deposition, indicated the same thing.

On Friday, February 27, 1981, at approximately 11:00 a.m., the Contro brothers appeared at the Victory Office in Laredo, Texas and presented the short-form bills of lading, demanding the merchandise. At this confrontation, Aquino declined to release the merchandise to the Contro brothers because she insisted on seeing a long-form "ocean bill of lading." She was not familiar with the short-form bills presented by the Contros. Aquino had been employed only since December 1980 and was thus somewhat inexperienced. In the absence of Munoz, Aquino showed the bills of lading to Roberto Delgado, the manager of Victory. Delgado expressed the view that the documents appeared irregular to him and suggested that Munoz be called in Houston, Texas. This apparently angered the Contro brothers. They were also upset to learn that the containers had been unloaded, thus causing a delay in further handling plus added expense. Heated words were exchanged. One of the Contros ultimately

spoke with Munoz over the telephone and that conversation also became heated.

The Contro brothers returned to the Victory office on Saturday, February 28, 1981, but encountered neither Aquino nor Munoz on the occasion. They did encounter Mr. Delgado of Victory Transfer, but apparently nothing was resolved at that time.

On or about December 15, 1980, Petitioner had entered into a contract with a Mexican company, Administradora Abarrotera de Compras Alianza, S.A. ("AACA") to sell the brandy in question. The latter had agreed to purchase 10,000 cases of brandy at 2750 pesos per case. The contract provided that at least 3500 cases must be delivered by March 3, 1981, or else the order was cancelled. This delivery date was not met and therefore the contract was cancelled. Petitioner pleads for lost profits under the contract, damage to its reputation for non-fulfillment of the contract, compensation for merchandise damaged, and attorneys fees.

Of the total amount of brandy delivered to Plaintiff in Mexico City, 740 cases were damaged or destroyed to an extent which made them unsaleable. The merchandise cost Plaintiff $100.00 per case. The fair market value of the merchandise in Mexico City on February 27-28, 1981 was $120.00 per case.

The evidence of damaged goods arriving in Mexico City is essentially undisputed. There is no evidence that Sea-Land knew anything about Plaintiff's contract with AACA at the time that it contracted to ship the merchandise in December 1980. The evidence does indicate that at the February 27 and 28 confrontations, Petitioner's representatives told agents of the Respondents in general terms that there was some urgency to having the merchandise, that contractual arrangements for the merchandise would be jeopardized if at least three containers were not delivered and that the Defendants would be held responsible for the consequences.

ARGUMENT

A. This Writ Should Be Granted Because the Decision of the Fifth Circuit Court of Appeals Conflicts With Decisions of Other Courts of Appeals, With Respect to the Effect of a Joint Pre-Trial Order, on Issues That May Be Raised in the District Court.

On November 18, 1982, all of the parties to this cause filed their joint pre-trial order (App. E, 19a-25a). The case was submitted as a diversity case under state law, not a federal case under the Harter Act or Carriage of Goods by Sea Act. Texas law governing the dishonoring of a short-form bill of lading in Laredo, Texas, was not applied, however. In the joint pre-trial order, Sea-Land's sole defense to the claim of damage for destroyed goods was that ". . . Plaintiff is not entitled to include any claim for loss in connection with cargo not listed on the form bills of lading attached to the original complaint herein." In essence it claimed the defense of the statute of limitation as to the goods listed on the other form bills of lading (there were eight bills of lading), ignoring Rule 15(c) F.R.C.P. providing that an amended pleading relates back to the date of the original pleading whenever the claim arose out of the transaction set forth in the original pleading.

The Tenth Circuit Court of Appeals and the Ninth Circuit Court of Appeals have ruled that issues or contentions not listed in the joint pre-trial order are not properly raised in district court. *Trujillo v. Uniroyal Corp.*, 608 F.2d 815 (10th Cir. 1979); *United States v. Joyce*, 511 F.2d 1127 (9th Cir. 1975). The decision of the court below thus is squarely in conflict with the Tenth and Ninth Circuit courts.

Additionally, the Tenth Circuit Court of Appeals, the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals have ruled that a party need offer no proof at trial as to matters agreed to on defenses not

raised in the pre-trial order, nor may a party offer evidence or advance theories at trial which are not included in the pre-trial order or which contradict its terms. *United States v. First National Bank of Circle*, 652 F.2d 882 (9th Cir. 1981); *Air-Exec., Inc. v. Two Jacks, Inc.*, 584 F.2d 942 (10th Cir. 1978); *Roberto v. Roberto*, 452 F.2d 635 (9th Cir. 1971); *United States v. Sommers*, 351 F.2d 354 (10th Cir. 1965), *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948 (5th Cir. 1959). Nevertheless, even if it had been submitted as a federal case and COGSA had been validly incorporated by reference in the bill of lading, COGSA by its own terms does not govern the relationship of the parties after discharge from the vessel and simply does not address itself to such problems as dishonoring bills of lading. *Allstate Insurance Company v. Imparca Lines*, 646 F.2d 166 (5th Cir. 1981). The Harter Act applies from the point of discharge until proper delivery upon a fit and customary wharf. Id.

It is clear, therefore, that the applicable law is Texas law, just as submitted in the pre-trial order.

By affirming the judgment, findings of fact and conclusions of law of the district court, the Fifth Circuit Court of Appeals has created a conflict with decisions of other circuits.

B. This Writ Should Be Granted Because the Fifth Circuit's Affirmance of the Trial Court's Conclusion That the Term "House To House" Typewritten on the Face of the Eight Short-Form Bills of Lading is Subject to Provisions in a Tariff Incorporated by Reference in the Long Form Bill of Lading Which Is in Turn, Incorporated by Reference in the Short Form Bill of Lading Conflicts With Decisions of Other Courts of Appeals.

It is universally recognized that written words are controlling over any printed provisions to the contrary and specifically terms such as "pier to pier" and "house to

house" over conflicting terms printed in a bill of lading. *B. Elliot (Canada) Ltd. v. John T. Clark & Son*, 704 F.2d 1305 (4th Cir. 1983); *Delhomme Industries Inc. v. Houston Beechcraft, Inc.*, 660 F.2d 1049 (5th Cir. 1982); *Kessler v. Pennsylvania Nat. Mut Cas. Ins. Co.*, 531 F.2d 248 (5th Cir. 1976).

Vicente Munoz, Sea Land's manager defined the term House to House at pages 29-30 of his deposition (App. F, 26a-27a)

> "A. House-house means that if in the normal course of transit a container is processed or moved smoothly, it moves from wherever it's loading to whenever the consignee is, whoever is unloading, to his door, to his warehouse, subject to the terms of the bill of lading"

Maria Del Carmen Aquino Sea Land's local agent defined the term at page 140 of the transcript of trial (App. G, 28a).

> "A. Yeah. It's that the shipment goes from one place to the other without it being unloaded."

Sea Land in its brief filed in the Fifth Circuit, defines the term at page 10 as follows:

> "It is common ground that Negrito's cargo was shipped on a "house to house" basis meaning that both parties contemplated that Sea land would deliver the cargo to Negrito *in Nuevo Laredo in the original ocean containers.* Negrito then could arrange discharge of the cargo from the containers there or after further transportation, as it pleased, returning the empty containers to Sea land at *Nuevo Laredo.*"

It is to be noted that Nuevo Laredo is in the Republic of Mexico.

Hector Contro the Plaintiff-Petitioner, officer defined the term at page 29 of the Transcript of Trial (App. H, 29a)

"A. And we paid for it House to House, because, otherwise, it wouldn't be safe.

Q. Does that mean that the merchandise is not supposed to be unloaded out of the container?

A. Not supposed to be.

Q. It's supposed to be transported to its destination in the same container?

A. On the same container. In fact, if we don't pick it up on time, all we have to pay is the demurrage or charges for not picking them up on time. But they unloaded it anyhow. . . ."

The foregoing are *all* of the definitions of the term "House to House" found in the record.

It is undisputed that the goods were unloaded and unpacked in Laredo, Texas prior to arriving in Nuevo Laredo, Tamaulipas, Republic of Mexico. *Accordingly under Sealand's own definition and that of its manager it breached the "House to House" contract.*

Its own breach in turn caused the delays, necessity for customs inspection, etc. and breakage.

The only way Sealand can justify its actions of unloading the goods contrary to the "House to House" contract is if the printed provisions of the long form bill of lading and tariff, permitting unloading of goods not claimed within 10 days from date of arrival, prevail over the typewritten words "House to House" on the face of each of the eight bills of lading. It is, however, universally recognized that written words are controlling over any printed provisions to the contrary and specifically terms such as "pier to pier" and "house to house" over conflicting terms printed in a bill of lading. *B. Elliot (Canada) Ltd. v. John T. Clark & Son*, 704 F.2d 1305 (4th Cir. 1983). *Delhomme Industries Inc. v. Houston Beechcraft Inc.*, 660 F.2d 1049 (5th Cir. 1982); *Kessler v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 531 F.2d 248

(5th Cir. 1976); *Southland Royalty Co. v. Pan American Petroleum Corp.*, 398 S.W. 2d 50 (Sup. Ct. 1964); *McMahon v. Christmann*, 303 S.W. 2d 341 (Sup. Ct. 1957). Additionally, the bill of lading was prepared by Sea Land itself and must be construed strictly against it. *Whittington v. Cameron Compress Co.*, 268 S.W. 216 (Tex. Civ. App. 1923) affd. 280 S.W. 527; *Republic National Bank v. Northwest National Bank*, 578 S.W. 2d 100. (It should be noted that at oral argument Sea Land's counsel conceded that the long form bill of lading and tariff make no reference to the term "House to House".)

It is clear, therefore, that Sea land cannot rely on the printed provisions of its long form bill of lading and tariff incorporated by reference in its short form bill of lading because they are in conflict with the "House to House" contract as defined by them and their manager. The term "House to House" would be meaningless if the printed provisions were permitted to prevail as in non "House to House" contracts.

The Fifth Circuit Court, during oral argument also expressed concern as to Sea Land's lack of control of the goods beyond Mexican customs in Nuevo Laredo, Tamaulipas, Republic of Mexico. It is to be noted that Sea Land itself did not raise this defense. In fact, Sea Land did not contend that it was not negligent, or that damage did not occur while the goods were in their custody or control. Their sole defense was limitations as to the goods listed on the four bills of lading that were not attached to the original complaint (See Pre-Trial Order App. E, 19a-25a).

Clearly, this decision is squarely in conflict with the Fourth Circuit and a prior decision of the Fifth Circuit.

CONCLUSION

The petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-2381

NEGRITO COMMERCIAL, S.A.,
Plaintiff-Appellant,

versus

SEA-LAND SERVICE, INC. and
VICTORY TRANSFER CO.,
Defendants-Appellees.

[Filed July 29, 1985]

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(July 29, 1985)

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Witt Garwood
United States Circuit Judge

7/24/85

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2381

D.C. Docket No. CA-L-81-71

NEGRITO COMMERCIAL, S.A.,
Plaintiff-Appellant,

versus

SEA-LAND SERVICE, INC. and
VICTORY TRANSFER CO.,
Defendants-Appellees.

[Filed Aug. 8, 1985]

Appeal from the United States District Court for the Southern District of Texas

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Before GOLDBERG, REAVLEY, and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 10, 1985

Issued as Mandate: Aug. 8, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2381

NEGRITO COMERCIAL, S.A.,
Plaintiff-Appellant,

versus

SEA-LAND SERVICE, INC. and
VICTORY TRANSFER COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

(June 10, 1985)

Before GOLDBERG, REAVLEY, and GARWOOD, Circuit Judges.

PER CURIAM:*

The judgment below that the plaintiff-appellant take nothing by its suit properly follows from the district court's well-considered and thorough findings of fact and conclusions of law. Being of the opinion that the district court's findings of fact are not clearly erroneous, and being in general agreement with its conclusions of law, we affirm the judgment below.

AFFIRMED.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Civil Action No. L-81-71

NEGRITO COMMERCIAL, S.A.,
Plaintiff,

vs.

SEA-LAND SERVICE, INC. and
VICTORY TRANSFER CO.,
Defenadnts.

[Filed June 22, 1984]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court on November 2-3, 1983. Pursuant to Rule 52(a) Fed. R. Civ. P., the Court now makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Negrito Comercial, S.A. ("Negrito") is a Mexican corporation with its principal place of business in Mexico City. In December 1980, it purchased approximately 11,000 cases of brandy from the Fernando A. De Terry Company of Spain.

2. The brandy was loaded into eight sealed containers of 1375 cases. On December 16, 1980, these containers were delivered to Defendant Sea-Land Service, Inc. ("Sea-Land") at Algeciras, Spain. They were loaded aboard

the vessel Independence for carriage to the port of Houston, Texas. The ultimate "port of discharge" was Nuevo Laredo, Mexico.

3. Eight short-form bills of lading were issued by Sea-Land covering the merchandise. The merchandise was received by Sea-Land in good condition and no exceptions were noted on any of the bills of lading as to either damaged goods or shortages.

4. The merchandise arrived in Laredo, Texas in different deliveries occurring between January 8 and 14, 1981.

5. On each bill of lading, in the space labled "Notify Party", was inserted Negrito's name and its Mexico City address. No customs broker at the Laredo port was designated on the bills.

6. Defendant Victory Transfer, Inc. ("Victory"), a Texas corporation, is the duly authorized agent for Sea-Land. Maria del Carmen Aquino was a Victory employee whose primary duty was to handle Sea-Land matters. Vincent Munoz was the operations coordinator for Sea-Land business in Laredo, Texas. The relationship between the two companies was that Victory would pick up containers off-loaded at the water port in Houston, bring them overland to Laredo, Texas and make them available to consignees and customs brokers for crossing into Nuevo Laredo, Mexico. In that capacity, Victory would receive and deliver merchandise as Sea-Land's agent.

7. Sometime in December 1980, Sergio Rivas, a Mexican customs broker representing Negrito, conversed with Aquino and advised that he was expecting the shipment of brandy from Spain. Aquino promised to call him when the shipment arrived, but got busy and forgot. However, according to the deposition of Eduardo Contro, the general manager and a stockholder of Negrito, the Plaintiff was aware of the arrival of the merchandise in Laredo as early as January 19 or 20, 1981. It received the information originally from its Mexican bank.

8. The primary controversy in this lawsuit, aside from the question of damage to some of the merchandise, results from a dispute that occurred when Mr. Contro and his brother appeared at the Victory office in Laredo to claim the merchandise. It is undisputed that this controversy occurred on Friday, February 27, 1981. The parties, however, dispute whether or not this was the first time that there was any manifestation of a controversy over delivery of the shipment in question.

9. Rivas testified that he went to the Victory office in Laredo as early as February 15, 1981, attempting to have some or all of the merchandise crossed into Mexico, but that he was rebuffed. Hector Contro, a co-owner of Negrito, testified that Rivas reported this incident to him on February 24 which prompted the trip of February 27 to Laredo by the Contro brothers. Aquino testified that the confrontation of February 27 was the first discussion of the matter and Munoz, by deposition, indicated the same thing. The Court finds that February 27, 1981, was indeed the first time that Plaintiff requested delivery of the merchandise. Munoz was in Houston and Aquino was the person who met with the Contros. Her lack of familiarity with the short-form bill, the lack of time to arrange for customs inspection, and the argument over the costs caused the stalemate. The Court finds it unlikely that this controversy would have continued for two weeks prior to February 27. Moreover, in his sworn deposition given in March 1982, Eduardo Contro repeatedly testified that the bills of lading were brought to Laredo, Texas for the first time on February 27. He even explained the reason for the delay, namely that his Mexican bank took time passing the papers from its main credit department to a branch bank. Admittedly Mr. Contro substantially rewrote his deposition on the second day of trial, in November 1983, but the Court finds his original testimony to be more believable.

10. On Friday, February 27, 1981, at approximately 11:00 a.m., the Contro brothers appeared at the Victory office in Laredo, Texas and presented the short-form bills of lading, demanding the merchandise. Unfortunately, on or about February 11-12, 1981, the cases of brandy had been taken out of the original eight sealed containers and placed in storage trailers at the Victory yard. The off-loading was done to free the original containers for further use in other shipments. The authority for the off-loading was derived from paragraph 15 of Sea-Land's long-form bill of lading, incorporated by reference into the short-form. The procedure was further based on Sea-Land's published tariff (SL Ex. 2), providing that if the consignee fails to prepare documents in order to move containers from Laredo, Texas into Nuevo Laredo, Mexico within ten days from the arrival of the containers in Laredo, Sea-Land has the option to have the cargo stripped from the containers and loaded into a warehouse in Laredo, at the risk and expense of the cargo.

11. At the February 27 confrontation, Aquino declined to release the merchandise to the Contro brothers because she insisted on seeing a long-form "ocean bill of lading". She was not familiar with the short-form bills presented by the Contros. Aquino had been employed only since December 1980 and was thus somewhat inexperienced. In the absence of Munoz Aquino showed the bills of lading to Roberto Delgado, the manager of Victory. Delgado expressed the view that the documents appeared irregular to him and suggested that Munoz be called in Houston, Texas. This apparently angered the Contro brothers. They were also upset to learn that the containers had been unloaded, thus causing a delay in further handling plus added expense. Heated words were exchanged. One of the Contros ultimately spoke with Munoz over the telephone and that conversation also became heated. The fact that the original sealed containers on this in-bond shipment had been broken triggered a cumbersome procedure involving U.S. customs. In such cases,

a broker is required to prepare certain documents and then place his name on a waiting list maintained by U.S. Customs, to obtain a U.S. customs inspector to supervise the reloading of the cargo for entry into Mexico. Apparently these inspectors serve on a voluntary basis on their days off and there is a certain delay in having any particular load inspected. Munoz was informed that it would not be possible to have an inspector check this load in the remaining hours of Friday, February 27.

12. The Contro brothers returned to the Victory office on Saturday, February 28, 1981, but encountered neither Aquino nor Munoz on that occasion. They did encounter Mr. Delgado of Victory Transfer, but apparently nothing was resolved at that time. It is not clear from the evidence what happened next except that the Contro brothers returned to Mexico City. Some time later Sergio Rivas met with Munoz and the matter was apparently settled without further difficulty. Aquino testified that the matter was settled the following Monday. However, in a memo attached to his deposition, Munoz indicates that while he spoke with Rivas the following Monday, he received no further instructions from Rivas until early April. There was evidence, undisputed, that the first check tendered by Plaintiff to Sea-Land for freight and demurrage on the first shipment to be released did not have sufficient funds in the bank to cover it, and the Plaintiff was required to issue a certified check in replacement. The first container of cases was delivered in Mexico City on or about April 7, 1981. The next container was delivered in June, two were delivered in July, one in September, two in October, and the final delivery was in mid-November 1981. No particular explanation was given for this staggered delivery schedule and the Court can only presume that it was done at the option of the Plaintiff.

13. On or about December 15, 1980, Plaintiff had entered into a contract with a Mexican company, Adminis-

tradora Abarrotera de Compras Alianza, S.A. ("AACA") to sell the brandy in question. The latter had agreed to purchase 10,000 cases of brandy at 2750 pesos per case. The contract provided that at least 3500 cases must be delivered by March 3, 1981, or else the order was cancelled. This delivery date was not met and therefore the contract was cancelled. Plaintiff pleads for lost profits under the contract, damage to its reputation for non-fulfillment of the contract, compensation for merchandise damaged, and attorneys fees.

14. Of the total amount of brandy delivered to Plaintiff in Mexico City, 740 cases were damaged or destroyed to an extent which made them unsaleable. The merchandise cost Plaintiff $100.00 per case. The fair market value of the merchandise in Mexico City on February 27-28, 1981 was $120.00 per case. Mr. Hector Contro testified that by May and June 1981, the market value had decreased to $80.00 to $100.00 per case, but then stated that when Plaintiff attempted to sell the merchandise at some unspecified time during that period, it could only obtain $69.00 per case for the product. He further testified that Plaintiff still has 4,000 unsold cases which have a market value of $66.00 each.

15. While the evidence of damaged goods arriving in Mexico City is essentially undisputed, there is no evidence of any damage in Nuevo Laredo. At best, there is evidence that Rivas inspected at least one of the shipments in Nuevo Laredo and found the packaging to be very inadequate. He claimed that many bottles were loose and that he could barely open the rear doors of the trailer for fear that the contents would fall out. Rivas opined that the shipment he described was one of the "last" of the series. There is no evidence that that any remedial measures were taken or ordered by Rivas at that point. Apparently the trailer was simply closed and the truck went on its way by land to Mexico City, over 700 miles away. There is no evidence as to the identity of the Mexican

trucking company, but it was independent of the Defendants and hired by Negrito.

16. There is no evidence that Sea-Land knew anything about Plaintiff's contract with AACA at the time that it contracted to ship the merchandise in December 1980. The evidence does indicate that at the February 27 and 28 confrontations, Plaintiff's representatives told agents of the Defendants in general terms that there was some urgency to having the merchandise released, that a customer in Mexico was waiting for the merchandise, that contractual arrangements for the merchandise would be jeopardized if at least three containers were not delivered by the following week and that the Defendants would be held responsible for the consequences.

CONCLUSIONS OF LAW

1. Plaintiff's First Amended Complaint alleges jurisdiction based solely on diversity of citizenship and pleads what amounts to a simple common-law breach of contract, namely failure to honor a bill of lading by refusing to deliver merchandise on demand. The long-form bill of lading, however, provides that so long as the goods are in the custody of Sea-Land or its agents, the bill of lading governs and is subject to the provisions of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300, et seq. While COGSA generally applies only to goods and shipment between a foreign port and the United States, and only while the goods are on board the ship, the provisions of COGSA can become applicable if so stated in the bill of lading. *Firestone Tire and Rubber Co.* v. *Almacenes Miramar, Inc.*, 452 F. Supp. 670 (D. Puerto Rico), *aff'd.* 588 F.2d 817 (1978); *Jamaica Nutrition Holdings* v. *Great Circle Shipping, Inc.*, 433 F. Supp. 1067 (S.D. Ala. 1977). Exclusive application of COGSA cannot be avoided by couching claims in terms of negligence or other common-law clauses of action. *Miller Export Corp.* v. *Hellenic Lines, Ltd.*, 534 F. Supp. 707,

710 (S.D.N.Y. 1982). Thus the Court concludes that Plaintiffs reliance on the Texas Business and Commerce Code is misplaced. Instead the Court looks to COGSA, the applicable bills of lading, and relevant federal law.

2. The primary issue involves the refusal of the Defendants to release the merchandise on February 27-28, 1981. One reason for the conflict was Ms. Aquino's unfamiliarity with the short-form bill of lading and her insistence on seeing a long-form bill. In this she erred. An equal reason for the difficulty, however, was the inability to make proper arrangements with U.S. customs on short notice and the controversy over demurrage costs. This in turn stemmed from the fact that the merchandise had previously been removed from the original containers.

3. The removal of the merchandise from original containers after a grace period, and the charging of fees for loading, unloading and storing under those circumstances, was done pursuant to Sea-Land's published tariff. This Court has been unable to find any legal authority prohibiting such a tariff provision. None has been cited to the Court. Plaintiff relies on *Carribean Produce Exchange* v. *Sea Land Service*, 415 F. Supp. 88 (D. Puerto Rico 1976). There the Court held that as a general rule, a common carrier cannot stipulate for immunity from its own negligence. While approving the practice of incorporating provisions of the long-form bill of lading into a short-form bill of lading, such incorporation was held void as to a provision limiting liability for negligence. Instead any such limitation must be contained in the short-form bill of lading itself. The Court does not question that holding but only its relevance to this fact situation. Indeed COGSA itself provides that any clause in a contract of carriage which relieves the carrier from liability for loss or damage arising from negligence, fault or failure in the duties and obligations provided therein, shall be null and void. 46 U.S.C. § 1303(8). The ques-

tion is whether the provision that the goods can be removed from their original container if not claimed within a certain period of time can be fairly characterized as an attempt to immunize the shipper from negligence or limit its liability for fault. The Court concludes that it cannot be so characterized and thus concludes that the provision is valid.

4. For the same reason, the Court finds valid the provision in paragraph 15 of the long-form bill that the carrier shall not be required to give any notification of arrival, discharge, or other action taken with respect to the goods, notwithstanding any custom or practice to the contrary. *See Levatino* v. *General Steam Navigation Co.*, 170 F. Supp. 756, 763 (S.D.N.Y. 1959). Under the facts of this case, however, that particular provision is moot because of the evidence that Plaintiff had actual notice of the arrival of the goods at least 20 days before the cases were taken out of the original containers.

5. Plaintiff, through testimony of Hector Contro, contends that the phrase "house to house" means that the cargo is never to be unloaded from the original containers, regardless of any delay on the part of the consignee in claiming the cargo at the port. Munoz, via deposition, defined the phrase to mean "that if in the normal course of transit a container is processed or moved smoothly, it moves from wherever it's loading to wherever the consignee is, whoever is unloading, to his door, to his warehouse, subject to the terms of the bill of lading." (Depo. p. 29-30). Munoz insisted that the phrase was subject to the provisions of the bill of lading and tariff with respect to unloading the container after a certain period of time. Miss Aquino ventured that the phrase simply means "the shipment goes from one place to the other without being unloaded." Reported cases from the Fourth Circuit indicate that "house to house" calls for the shipper to pack the container at the shipper's own facility and deliver the packed container to the carrier at the point of departure

for further loading aboard the vessel. At the point of destination, the container is unloaded from the vessel and taken to a container yard, from which it is picked up by an outside trucking company for hauling to the ultimate consignee. *Koppers Co.* v. *S/S Defiance*, 542 F. Supp. 1356 (D. M.D. 1982), *aff'd* 704 F.2d 1309 (4th Cir. 1983).

Neither side has furnished any legal authority as to whether or not the "house to house" directive is subject to other conditions of the bill of lading or tariff, nor has this Court found any. The Court concludes that, at least under the facts of this case, "house to house" does not have the paramount meaning ascribed to it by Negrito. It does not seem reasonable to conclude that Sea Land was obligated to hold the sealed containers indefinitely once Negrito failed to make timely arrangements to cross the shipment into Mexico.

6. In any event, the Court concludes that the "house to house" issue is not controlling in this case. As to the alleged delay in crossing the goods, the prior unloading of the containers was undoubtedly one reason why the shipment could not be crossed on demand on a Friday afternoon. Nevertheless, the Court concludes from the evidence that the matter could easily have been resolved by the following Monday and Negrito would not have incurred any consequential damages. Negrito has not satisfactorily explained why this did not happen. Instead the evidence indicates that no other shipping arrangements were made until approximately a month later. At the very least, it cannot be said that Negrito has sustained its burden of proving that Sea Land negligently or willfully delayed shipment to an extent which caused the damages claimed.

7. There is a further problem with Negrito's claim for damages for delay. In its post-trial brief, Negrito urges that this claim is governed by the Texas Business and

Commerce Code. The Court disagrees, holding that COGSA applies instead. That Act provides that the carrier shall in no event be liable for more than "the amount of damage actually sustained." 46 U.S.C. § 1304(5). Paragraph 22 of the bill of lading provides that the carrier "shall not be liable for any consequential or special damage." The Court concludes that the proper measure of damages, assuming liability, would be the difference between the market value of the goods at the time and place they should have arrived and the market value of the goods when they did arrive. *Atlantic Mutual Insurance Co.* v. *Poseidon Schiffahrt*, 313 F.2d 872, 875 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Santiago* v. *Sea-Land Service, Inc.*, 366 F. Supp. 1309, 1314 (D. Puerto Rico 1973). Applying this measure of damages, there is insufficient evidence to support an award to the Plaintiff in this record. The Plaintiff's theory was that since at least three containers were not delivered in Mexico City by March 3, 1981, it is entitled to the full sales contract price of $120.00 per case, less the decreased market value several months later. Aside from the question of whose fault it was that the merchandise was not released at Laredo, Texas on February 27-28, 1981, the evidence indicates that in any event it could have been released without incident the following week, but that Plaintiff made no arrangements for shipment until a month later and even then only asked for a partial release of the merchandise. While there is evidence of the market value of the merchandise on February 27-28, there is no evidence as to what the market value would have been the following week, presumably because this was not the theory under which Plaintiff attempted to prove its case. Nevertheless there seems no justifiable reason for holding the Defendant responsible for the apparent drastic decline in market value many months later.

8. The Court concludes that Negrito has also failed to prove its claim for damaged goods. To establish a *prima facie* case, Negrito must show that the cargo was loaded in an undamaged condition and delivered in a damaged condition. *See Socony Mobil Oil Co.* v. *Texas Coastal and International, Inc.*, 559 F.2d 1008 (5th Cir. 1977). Here, there is no difficulty finding that the goods were undamaged when loaded in Spain and that 740 cases arrived damaged in Mexico City at some later time. The problem is that the port of discharge for Sea Land was Nuevo Laredo. There is scant evidence as to the condition of the cargo at that point. At best, the evidence showed that when one shipment arrived in Nuevo Laredo, the packaging was in poor condition. This poor packaging, if true, may well have ultimately resulted in breakage somewhere on the road to Mexico City, while in the custody of another carrier, but it is not equivalent to proving that the goods actually arrived damaged in Nuevo Laredo. While neither side has briefed the point, it would seem that the logical remedy for the situation in Nuevo Laredo, as described by Rivas, would be to repack the cargo and seek damages for that expense rather than continuing the cargo on its journey in an obviously precarious position. Further, it is not even clear that the shipment described by Rivas in Nuevo Laredo is the same one in which all or any of the 740 damaged cases were found.

9. For the foregoing reasons, the Court concludes that Plaintiff has failed to prove its cause of action. To the extent that any Findings of Fact herein are more properly deemed Conclusions of Law, and vice versa, they are hereby adopted as such.

DONE at Laredo, Texas, this 22nd day of June, 1984.

/s/ George P. Kazen
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Civil Action No. L-81-71

NEGRITO COMERCIAL, S.A.,
Plaintiff,

vs.

SEA-LAND SERVICE, INC. and
VICTORY TRANSFER, INC.,
Defendants.

[Filed June 22, 1984]

FINAL JUDGMENT

Based on Findings of Fact and Conclusions of Law made in this case, it is ORDERED that Plaintiff Negrito Commercial, S.A. do have and recover nothing from the Defendants. Costs are taxed to the Plaintiff.

DONE at Laredo, Texas, this 22nd day of June, 1984.

/s/ George P. Kazen
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

C.A. No. L-81-71

NEGRITO COMERCIAL, S.A.,

vs.

SEA LAND SERVICE, INC. and
VICTORY TRANSFER, INC.,

PRE-TRIAL ORDER

I.

JURISDICTION

Jurisdiction is founded on 28 USCA § 1332 in that there exists complete diversity of citizenship between the Plaintiff and the Defendants and the matter in controversy exceeds $10,000.00 exclusive of interest and costs.

II.

NATURE OF THE CAUSE OF ACTION

This is a suit for damages arising from the Defendants refusal to deliver merchandise to the Plaintiff when they were presented with the short-form bills of lading for such merchandise by the Plaintiff; and for unloading the merchandise contrary to the terms specified in the bills of lading that such merchandise was shipped "house to house".

III.

PLAINTIFFS CONTENTIONS

Plaintiff contends that on or about December 19, 1980, it entered into a contract with Administradores Abarrotera de Compras Alianza, S.A., hereinafter referred to as AACASA, wherein it agreed to purchase from Plaintiff as many cartons of Brandy Terry that Plaintiff could provide with a maximum of 10,000 cartons at a price of $2,750.000 mexican pesos per carton to be delivered by Plaintiff to AACASA's warehouse in Mexico City, D.F., Republic of Mexico. The said contract further provided three additional conditions: (a) partial shipments were permitted; (b) the time limit for the initial delivery was fixed at March 3, 1981; and (c) Seven Million (7,000,000.00) mexican pesos were paid to Plaintiff as a down payment provided that if Plaintiff failed to deliver a minimum of 3,500 cartons by March 3, 1981 as contracted the said down payment was to be refunded to AACASA with interest and the entire contract would be cancelled.

Plaintiff contends that it promptly purchased 10,000 cartons of Brandy Terry from Fernando A. De Terry, S.A. in Puerto de Santa Maria, Spain hereinafter referred to as "Terry". Terry caused said 10,000 cartons to be delivered to the Defendant, Sea-Land, in Algeciras Spain for shipment to Plaintiff, and the Defendant, Sea-Land, issued eight short form bills of lading for said 10,000 cartons. The said 10,000 cartons arrived in Laredo, Texas on January 8, 1981 through January 14, 1981. The Defendants failed to notify the Plaintiff and its custom's agents of the arrival of said merchandise.

IV.

Plaintiff contends that in mid February of 1981 the Plaintiff, through its agents, Sergio Rivas and Oscar Alvarez, presented to the Defendants at Laredo, Texas the

eight short form bills of lading issued by the Defendant, Sea-Land, for the said 10,000 cartons same being properly endorsed by Banca Cremi, S.A. guaranteeing payment, but the Defendants with full knowledge of the deadline and consequences of the AACASA contract, refused to deliver the said 10,000 cartons or any part of said merchandise to Plaintiff or its agents.

Plaintiff contends that on or about February 28, 1981, the Plaintiff's representatives from Mexico City, Messrs. Hector Contro and Eduardo Contro, traveled to the Defendant's offices to attempt once again to receive delivery of the said 10,000 cartons, and again presented to the Defendants the said bills of lading, but the Defendants, with full knowledge of the deadline and consequences of the AACASA contract, again failed and refused to honor said bills of lading and again failed and refused to deliver the merchandise.

Plaintiff contends that as a result of Plaintiff's inability to deliver 3,500 cartons to AACASA by March 3, 1981, AACASA on March 4, 1981 cancelled its contract with Plaintiff and demanded return of its down payment with interest. Plaintiff refunded the Seven Million (7,000,000.00) mexican pesos down payment plus interest in the sum of Four Hundred Eight Thousand (408,000.00) mexican pesos.

Plaintiff contends that contrary to the terms of the bills of lading issued by the Defendants, the said 10,000 cartons were unloaded and opened by the Defendants causing damage to the merchandise and also resulted in shortages of same.

Plaintiff contends that as a result of the Defendants' wrongful actions, the Plaintiff: (a) was unable to comply with its contract with AACASA; (b) has lost the profits to be derived from such contract and lost AACASA as a customer; (c) has had its reputation damaged for non-fulfillment of its contract; (d) has been

damaged because the merchandise is damaged and shortages exist; and (e) is unable to dispose of the cartons it has paid for and has in its possession.

Plaintiff contends that as a direct result of the Defendants' wrongful actions hereinabove stated, the Plaintiff has been damaged in a sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

Plaintiff contends that the Plaintiff has found it necessary to employ the undersigned counsel to bring this action and asks for reasonable attorneys fees as may be allowed by law.

Plaintiff denies all of the Defendants' factual and legal conclusions set out below.

V.

DEFENDANTS' CONTENTIONS

According to the terms of carriage, as set out in Sea-Land's long form bill of lading, incorporated by reference in the short form used by the shipper in this case, Sea-Land had no duty to notify anyone of the arrival of the Plaintiff's cargo in Laredo. (It often does this as a courtesy when a local broker is named on the bill of lading.) In the normal course, a shipper sends the bill of lading to its purchaser, who has the responsibility, usually through its customs broker, of finding out when the ship and cargo arrive. In this case, when no one appeared to pay the freight and take the containers with the Plaintiff's cargo, after a reasonable time, Sea-Land, not being obliged to keep the cargo sealed in its ocean-transit containers indefinitely, had the cargo unloaded. This is Sea-Land's usual practice, it is provided for in the contract of carriage and in Sea-Land's published tariff, and it is reasonable.

When the plaintiff appeared at Victory Transfer's office on February 27, Friday, demanding its cargo immedi-

ately, Sea-Land could not reasonably be expected to comply because (1) the freight had not been paid and no arrangements for such payment had been made, (2) demurrage had not been paid and no arrangements for such payment had been made, (3) necessary documentation for transfer across the international border had not been prepared by the Plaintiff, and (4) customs inspectors were not available on such notice to attend reloading of the Plaintiff's goods into containers for delivery to Mexico. An anomaly in the way the bill of lading had been filled out by the shipper likely would have caused a delay in any event. When proper arrangements were made by the Plaintiff, starting weeks later, the cargo was delivered to the Plaintiff in duc course and in full compliance with the defendants' duties under their contract of carriage.

Defendants further contend that the Plaintiff was not damaged in any respect or to the extent claimed, and they are not liable for such special and consequential damages in any event.

Defendants also contend that the Plaintiff is not entitled to inclued any claim for loss in connection with cargo not listed on the four bills of lading attached to the original complaint herein.

VI.

ESTIMATED LENGTH OF TRIAL

This case is scheduled for trial to the Court without a jury. Counsel for all parties estimate that the trial can be completed in two days. The undersigned are available to begin the trial of this cause on either of the following days: December 14, 1982, December 21, 1982, January 11, 1983, January 18, 1983.

VII.

WITNESSES WHO WILL OR MAY BE CALLED BY PLAINTIFF

1. Eduardo Contro
2. Hector Contro
3. Sergio Rivas
4. Ruben Sandoval
5. Carmen Sauceda

WITNESSES WHO WILL OR MAY BE CALLED BY DEFENDANTS

1. Vincent Munoz
2. Carmina Aquino
3. Roberto Delgado
4. Roberto Quintanilla

VIII.

EXHIBITS TO BE ADMITTED WITHOUT OBJECTION

1. Copies of the four short form bills of lading issued by the defendant, Sea-Land, which are attached to Plaintiff's Original Complaint.
2. Copy of Plaintiff's contract with AACASA dated December 15, 1980.
3. Copy of receipt from AACASA dated March 4, 1981.
4. Sea-Land long form bill of lading.
5. Sea-Land Service, Inc. Memo Rate Sheet 3108-B From Med to Mexico, pages 7 and 8 (Tariff Rules & Regulations).
6. Transportation Entry and Manifests (T & E's) covering the merchandise referred to in the four bills of lading attached to Plaintiff's Original Complaint.

7. Manipulation Permits covering the merchandise referred to in the four bills of lading attached to Plaintiff's Original Complaint.

Respectfully Submitted,

ZAFFIRINI AND CUELLAR
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Attorney for Defendant,
Victory Transfer Company

APPENDIX F

* * * *

* * * and if she feared if the document had been altered, did she make any attempt to ascertain if it was a bona fide typing correction, or whether, in fact, it had been altered?

A. No, I don't think so.

Q. Was Banca Cremi the true consignee?

A. Yes, they were.

Q. Did you tell Miss Aquino to write a letter to Mr. Contro advising him of any reason why he could not have his merchandise?

A. I don't think so. I don't recall giving her that instruction.

Q. Do you know if she prepared a letter to Mr. Contro advising him of the reasons why the merchandise could not be delivered to him?

A. I don't know if she did. If she would have, it would not have surprised me when something happens with a client, we usually like to put it in writing but I don't think I was aware that anything had gone out in writing. I may be wrong on that.

Q. What does the term "house-to-house" mean, and what are the requirements of that term, or obligations implied by that term?

A. House-to-house means that if in the normal course of transit a container is processed or moved smoothly, it moves from wherever it's loading to wherever the consignee is, whoever is unloading, to his door, to his warehouse, subject to the terms of the bill of lading.

Q. So that a shipment that goes house-to-house is not to be unloaded or unpacked, would that be correct?

A. Not really. They can be. If the terms of the bill of lading are not met, then it can be unloaded as per the published tariff.

Q. What terms are not met, for example?

A. When a container arrives at the border point, it is given five free days, five working days, in which possession of it is to be taken by the consignee or his broker, to cross it.

Q. And after the five days—

A. After the five days—okay, I'm sorry.

Q. —you or Sea Land has the right to unload it?

A. That's right.

Q. Does it have the right to unpack it?

MR. NEWTON: Wait, wait, wait, what's the difference between unloading and unpacking?

MR. ZAFFIRINI: Unload a container, but unpacking the cartons.

A. (The witness) I'm not certain if they have * * *

* * * *

APPENDIX G

* * * *

* * * he would have talked to Mr. Munoz and Mr. Munoz would give an okay on releasing the merchandise. And that's when we contacted Munoz.

Q Okay. And what did you ask Munoz?

A I told him that Mr. Contro was there that he wanted to take out his merchandise but he was not willing to pay for the demurrages and the storages and the unloading and the reloading.

Q Did you tell him that he only had a short form bill of lading?

A Yeah, I did.

Q And what were his instructions to you?

A He told me that he couldn't see what was going on through the phone and that the only thing for me to do was to wait—was to wait till Monday so that he could see if he would honor it.

Q Now, these bills of lading show or have on their face typed the word "house-to-house." Can you tell us what that means?

A Yeah. It's that the shipment goes from one place to the other without it being unloaded.

Q Okay. That's typed into the face of these documents, right?

A Uh-huh.

Q Mrs. Moreno, I'm going to hand you what has been admitted * * *

* * * *

APPENDIX H

* * * *

* * * the contract, house-to-house.

The Court: Does it say that?

Mr. Zaffirini: On the page of these bills of lading, Judge, it says "house-to-house."

The Court: Okay.

Q (Mr. Zaffirini resuming) Let's clarify that a little more for the Court, Mr. Contro.

A And we paid for it house-to-house, because, otherwise, it wouldn't be safe.

Q Does that mean that the merchandise is not supposed to be unloaded out of the container?

A Not supposed to be.

Q It's supposed to be transported to its destination in the same container?

A On the same container. In fact, if we don't pick it up on time, all we have to pay is the demurrages or charges for not picking them up on time. But they unloaded it anyhow. And this is why they broke a lot of merchandise. And not only that, they send it in big boxes where bottles were hitting each other and they arrived broken. And not only did we lose the contract, but we lost a lot of cases. Somewhere there's a pictures that was taken by me with a Polaroid camera.

The Court: Well, let your lawyer—let's take one thing at a time; otherwise, we're going to get mixed * * *

* * * *

Supreme Court, U.S.
FILED
NOV 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-677

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NEGRITO COMERCIAL, S.A.,
Petitioner

v.

SEA-LAND SERVICE, INC. and VICTORY TRANSFER CO.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SEA-LAND SERVICE, INC.

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Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

BEST AVAILABLE COPY

I

CORPORATE INFORMATION

Respondent Sea-Land Service, Inc., is a wholly owned subsidiary of Sea-Land Corporation, a Delaware corporation.

Additional subsidiaries of Sea-Land Corporation are the following:

Container Freight Systems, Inc. (Delaware)
Intersea Operations, Ltd. (Hong Kong)
Sea-Land Industries (Bermuda), Ltd. (Bermuda)
Sea-Land Industries U.S.A., Inc. (Delaware)
Sea Readiness, Inc. (Delaware)
Sea-Land Aircraft, Inc. (Delaware)
Tacoma Terminals, Inc. (Washington)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-677

NEGRITO COMERCIAL, S.A.,
Petitioner

v.

SEA-LAND SERVICE, INC. and VICTORY TRANSFER CO.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SEA-LAND SERVICE, INC.

To The Honorable Judges Of Said Court:

STATEMENT OF THE CASE

Petitioner, a Mexican Corporation, bought 11,000 cases of brandy in Spain. The seller delivered this brandy in eight sealed Sea-Land containers to the respondent Sea-Land Service, Inc. at Algeciras, Spain, in return for eight bills of lading calling for "house-to-house" delivery

to the petitioner in Nuevo Laredo, Mexico. [Pet. 6a-7a] The brandy was carried by ship to Houston, then overland in customs bond to Laredo, Texas, where it was held by Sea-Land's agent, the respondent Victory Transfer Co., pending presentation of bills of lading and completion of border-crossing formalities by the petitioner. [Pet. 7a]

When the petitioner did not apply for its cargo within a reasonable time, Sea-Land unloaded the brandy from Sea-Land's transportation containers and put it into storage. [Pet. 9a, 13a-15a] When the petitioner appeared, late on a Friday, it was too late to arrange customs supervision to reload the cargo that day. [Pet. 9a-10a, 15a] Petitioner's representative applied for the cargo again on Saturday, but Victory's office was not open for business. [Pet. 10a] The petitioner did not apply for the cargo again for several weeks. [Pet. 10a] It then was delivered, as the petitioner made arrangements, over a period of eight months. [Pet. 10a]

Petitioner claimed damage as a result of its cargo's not being delivered at once when demand was made on Friday. [Pet. 19a-21a] Petitioner characterizes this as a dishonor of its bill of lading. [Pet. 6] Petitioner alleged that it lost a substantial resale contract because it could not get the brandy on that date. [Pet. 21a] The district court, after a bench trial, found that the brandy could not be delivered on Friday because it had been unloaded from the containers pursuant to valid and reasonable terms of Sea-Land's bill of lading and published tariff. [Pet. 13a-14a] It found that such unloading was not in violation of the "house-to-house" agreement. [Pet. 15a] The district court further found that petitioner could have avoided loss of its resale contract in any event if

it had pursued the matter on the following Monday. [Pet. 15a]

Petitioner also claimed damage as a result of physical mishandling of the cargo by Sea-Land and its agents. [Pet. 21a] Petitioner's proof, essentially, was that some of the brandy was found broken when it reached Mexico City, but this was after the brandy had been hauled, by trucks selected by the petitioner, 700 miles from Nuevo Laredo where it had been delivered to the petitioner by Sea-Land. [Pet. 11a, 17a] The district court found this proof insufficient to establish the responsibility of Sea-Land for such damage. [Pet. 11a, 17a]

The district court made extensive findings and conclusions, denying recovery to the petitioner. [Pet. 6a-17a] The court of appeals affirmed, noting briefly its general agreement with the district court. [Pet. 5a]

SUMMARY OF ARGUMENT

The courts below correctly applied federal law because the plaintiff's action is based on a maritime contract.

The courts below found no inconsistency between the "house-to-house" provision of the bills of lading and Sea-Land's printed and published terms describing the handling of cargo not picked up by consignees. The decision giving effect to those terms thus is not contrary to any principle of contract law.

The issue of plaintiff's physical damage was included in Sea-Land's pre-trial contentions and was tried without objection. The decision is not in conflict with any authority as to the controlling effect of a pre-trial order.

The decision below applied settled law to facts found on disputed evidence, and is of no interest to anyone except these litigants.

ARGUMENT

Applicable Law

The petitioner complains that the lower courts should not have applied federal law. Petitioner suggests that state law should have been applied because, as recited in the pre-trial order, the district court has diversity jurisdiction. But the action stated in the complaint and in the pre-trial order was for violation of an ocean bill of lading, a maritime contract governed by federal admiralty law, *The New Jersey Steam Nav. Co. v. The Merchants' Bank,* 47 U.S. (6 How.) 344 (1848). The maritime contract of carriage set out in the ocean bill of lading continued to govern the relationship of cargo owner and carrier after discharge of the cargo. *David Crystal, Inc. v. Cunard Steam-Ship Co.,* 339 F.2d 295 (2d Cir. 1964), *cert. denied,* 380 U.S. 976 (1965). Thus, federal maritime law is applicable regardless of the forum. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953). Petitioner cites no authority to the contrary.

In any event, there is no reason to believe any different result would have been reached if Texas law had been applied. *Cf. Corrigan Dispatch Co. v. Casa Guzman, S.A.,* 696 F.2d 359 (5th Cir. 1983).

House-to-House

Petitioner points out that its cargo might have been delivered on Friday if the containers had not been unloaded by Sea-Land and asserts that this unloading from the transportation containers was a violation of its "house-to-house" bill of lading agreement. Petitioner argues that the courts below have given effect to terms printed in a bill of lading form and set out in a published tariff though

in conflict with type-written provisions of the agreement, in violation of established contract law. But the courts below found that there *was* no conflict between the typed "house-to-house" provision and the printed bill of lading and published tariff terms describing procedures to be followed by Sea-Land in cases where the cargo receiver failed to follow the "house-to-house" arrangement. [Pet. 9a, 14a-15a] The result was clearly supported by the evidence.

There is nothing in this decision in conflict with that of any other court. The only case cited by petitioner as evidence of an inter-circuit conflict on this point is *B. Elliott (Canada) Ltd. v. John T. Clark & Son.*, 704 F.2d 1305 (4th Cir. 1983), which involved container cargo damaged after discharge from a ship and before delivery of the container to the consignee. The Fourth Circuit found the "pier-to-pier" designation inconsistent with bill of lading provisions that the ship was no longer responsible for the cargo after discharge from the ship and gave effect to the stamped "pier-to-pier" provision. That decision is in no way analogous to the decisions below that Sea-Land's printed requirements were reasonable and not inconsistent with its "house-to-house" agreement.

Damaged Cargo

With respect to its claim for physical damages, petitioner attempts to read the decisions below as sustaining a defense not included in the pre-trial order, to its prejudice, apparently arguing that there was no issue before the district court as to petitioner's physical damages. But the pre-trial order clearly recited Sea-Land's contention that the plaintiff was not damaged. [Pet. 23a] In any event, the physical damage issue was fully tried

without this objection's being raised, the petitioner itself calling three witnesses to testify on the point [Pet. 11a-12a], which forecloses the complaint presently made. FRCP 15(b); *Bradford Audio Corporation v. Pious,* 392 F.2d 67 (2d Cir. 1968); *Esquire Restaurant, Inc. v. Commonwealth Ins. Co. of N.Y.,* 393 F.2d 111 (7th Cir. 1968); *Knudson v. Boren,* 261 F.2d 15 (10th Cir. 1958). The decisions below denying the petitioner any recovery for physical damages cannot be read to conflict with other cases or the established law.

Summary

In short, this case involves nothing but the application of well settled principles of law to facts found by the district court on disputed evidence. It was correctly decided, and it cannot be of importance to anyone except these litigants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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